

## Was the Residual Mechanism's creation falling squarely within the Chapter VII power of the Security Council?

*Alexandre Skander Galand\**

### 1. Introduction

On 22 December 2010, more than fifteen years after the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively), the Security Council (SC) adopted under Chapter VII of the UN Charter the Statute of the International Residual Mechanism for Criminal Tribunals (Residual Mechanism Statute). SC Resolution 1966 (2010), to which the Residual Mechanism Statute is annexed, was adopted with 14 votes in favour and 1 abstention from the Russian Federation. During the SC meeting, the Russian representative explained his abstention as follows: 'The adoption of resolution 1966 (2010) by the Council was a step it was forced to take as a result of the Tribunals' drawing out their activities.'<sup>1</sup> The duration of the *ad hoc* tribunal's activities – and temporal jurisdiction for the ICTY – had indeed been agitating the SC for the past ten years.

The official record of the SC's meeting of 22 December 2010 does not indicate any debate on the legal basis to act under Chapter VII. It does show instead that the Residual Mechanism's creation was intended to send a 'clear signal to the Tribunals to take all possible measures to expeditiously complete their work', and 'prepare their closure.'<sup>2</sup> Since December 2000, the SC had started taking various reform measures that

\* Newton Post-Doctoral Fellow at Center for Global Public Law, Koç University; Visiting Scholar at Collegio Carlo Alberto/University of Turin; PhD in Law (EUI).

<sup>1</sup> UN Doc S/PV.6463 (22 September 2010).

<sup>2</sup> *ibid* 4.



would eventually be known as the *ad hoc* tribunals 'Completion Strategy'.<sup>3</sup> This process culminates a decade later with the creation by the SC, acting under Chapter VII UN Charter, of the Residual Mechanism.

Guido Acquaviva shows that two options were on the table: either transferring all cases and material to national jurisdiction or retaining the two *ad hoc* tribunals in place, with a slowly diminishing budget and administrative capacity.<sup>4</sup> Ultimately, 'the solution found is one of compromise between the two extremes'.<sup>5</sup> Two reasons underlined the need to establish a residual mechanism. On the one hand, the creation of the Residual Mechanism is due to the SC's tribunal fatigue and concerns with the costs associated with maintaining the *ad hoc* Tribunals. On the other hand, it is predicated on the need to preserve the *ad hoc* Tribunal's legacy, as well as to ensure that their completion strategies do not result in impunity for the indicted fugitives. Broadly, the Mechanism's functions are limited to the trial of fugitives, management of the archives, protection of witnesses, supervision of enforcement of sentences, trial of contempt and false testimony cases, referral of cases to national jurisdictions and revocation of cases, assistance to national authorities, and review of judgments.

In this paper, I question whether the Residual Mechanism's creation is a measure under Chapter VII of the UN Charter and whether it qualifies as such measure. First, I will show that the *ad hoc* tribunal's long term existence and exercise of jurisdiction conflicted with the nature of the powers of the SC under Chapter VII. Second, I will show that Resolution 1966 (2010) is not in full compliance with the procedural requirements to act under Chapter VII of the UN Charter. Third, I will survey the various features of the residual functions attributed to the Mechanism. In particular, I will show that some of the new functions provided in the Statute are continuous rather than *ad hoc*. However, these functions do not necessarily require the use of Chapter VII.

<sup>3</sup> UNSC Res 1329 (30 November 2000) UN Doc S/RES/1329. The term will be coined by Judge Jorda ICTY, Press Release, 'Extraordinary Plenary Session of Tuesday 23 April 2002' (24 April 2002); see also UNSC Verbatim Record (19 December 2008) UN Doc S/PV.6053; UNSC Res 1431 (14 August 2002) UN Doc S/RES/1431.

<sup>4</sup> G Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?' (2011) 9 *J Intl Criminal Justice* (2011) 789-796.

<sup>5</sup> *ibid* 794.



## 2. *Curing the permanency of the ad hoc tribunals*

The Security Council when establishing the ICTY through Resolution 827 (1993) indicated that the jurisdiction of the Tribunal covers the period ‘between 1 January 1991 and a date to be determined by the Security Council upon restoration of peace.’<sup>6</sup> According to the Secretary-General’s (SG) report which presented to the SC the ICTY’s draft Statute, ‘the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.’<sup>7</sup> On 30 November 2000, practically a year and a half after the end of the Kosovo War, the SC requested the SG to submit a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the ICTY.<sup>8</sup> However, the SG considered that he was ‘not in a position to make an assessment to the effect that peace has been restored in the former Yugoslavia.’<sup>9</sup> Three years later, the SC endorsed a completion strategy but never determined the end date of the Tribunal’s jurisdiction *ratione temporis*.<sup>10</sup>

Inevitably the open-ended jurisdiction of the ICTY was challenged by many defendants who stood accused of crimes committed almost a decade after the eruption of the conflict in the former Yugoslavia. However, the Tribunal interpreted its jurisdiction *ratione temporis* with great deference to the SC.<sup>11</sup> Clearly, the SC does not have the power to create

<sup>6</sup> UNSC Res 827 (25 May 1993) UN Doc S/RES/827, para 2.

<sup>7</sup> ‘Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)’ (21 February 2001) UN Doc S/25704, para 28.

<sup>8</sup> UNSC Res 1329 (n 3).

<sup>9</sup> UN Doc S/25704 (n 7) para 15.

<sup>10</sup> UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503; UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534.

<sup>11</sup> See *Prosecutor v Dordevic* (Decision of Vladimir Dordevic’s Preliminary Motion on Jurisdiction) IT-05-87/1-PT, T Ch III (6 December 2007) para 10; *Prosecutor v Milutinovic et al* (Decision on Motion Challenging Jurisdiction) IT-99-37-PT, T Ch III (6 May 2003) para 6; see G Sluiter, ‘Commentary’, in *Annotated Leading Cases of International Criminal Tribunals* vol 27, 26; see H van der Wilt, ‘Commentary’, in *Annotated Leading Cases of International Criminal Tribunals* vol 14, 115; D Bryden, ‘Commentary’, in *Annotated Leading Cases of International Criminal Tribunals* vol 34, 24; who all agree that the SC should have set an end date; *Prosecutor v Boskoski and Tarculovski* (Decision on Johan Tarculovski’s Motion Challenging Jurisdiction) IT-04-82-PT, T Ch (1 June

a permanent international criminal court for the former Yugoslavia.<sup>12</sup> The UN Charter requires that the ICTY's exercise of jurisdiction continues to be 'reasonably necessary' for the restoration or maintenance of international peace and security.<sup>13</sup> In practice, the establishment of the Residual Mechanism puts an end to the ICTY's indefinite jurisdiction as it will replace the Tribunal but cannot indict new accused.<sup>14</sup>

Conversely, the jurisdiction of the ICTR is firmly set in Article 1 of the Statute, which limits it to acts committed 'between 1 January 1994 and 31 December 1994'. Despite its limited temporal jurisdiction, the ICTR, like the ICTY, remained operative for more than a decade. This raises a further issue, which does not relate to the duration of jurisdiction but rather to the exercise of jurisdiction. For how long can a SC's subsidiary organ, endowed with Chapter VII power, remain operative? The closure of the *ad hoc* tribunals partly winds down this issue. However, as I will show in Section 3 the Residual Mechanism is bestowed with functions that imply an even longer lifespan than the *ad hoc* tribunals had. Furthermore, the establishment of the Residual Mechanism may create another type of legal problem. Have the requirements for acting under Chapter VII of the UN Charter been met?

### 3. *Have the UN Charter's requirements been met to act under Chapter VII?*

Despite the broad discretion accredited to the SC, Article 39 UN Charter involves a procedural and substantial limit to the use of Chapter VII powers.<sup>15</sup> The use of enforcement measures pursuant to Articles 41

2005) para 10; *Prosecutor v Boskoski and Johan Tarculovski* (Decision on Interlocutory Appeal on Jurisdiction) IT-04-82-AR72.1, A Ch (22 July 2005) para 10.

<sup>12</sup> 'Report of the International Law Commission on the work of its forty-sixth session' (1994) 2 YB Intl L Commission 22, UN Doc A/49/10; see also *Prosecutor v Tadic* (Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-I-AR72, A Ch (2 October 1995) para 63.

<sup>13</sup> Sluiter (n 11) p 26.

<sup>14</sup> Statute of the International Residual Mechanism for Criminal Tribunals, annexed to UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, art 1(5). Except with respect to contempt and false testimony, see Section 3.

<sup>15</sup> See N Krisch, 'Article 39' in B Simma and others (eds), *The United Nations Charter: A Commentary* (OUP 2012) 1276.



or 42 presupposes that one of the trigger events had been established under Article 39 UN Charter, ie a 'threat to the peace', 'breach of peace', or 'act of aggression'.<sup>16</sup> In contrast to the other trigger situations, a 'threat to the peace' is generally recognized as a political concept.<sup>17</sup> In the early years of the SC activities it was contested whether it included internal armed conflicts. Eventually, the SC started to use this term not only with respect to conflicts not of an international character but also for large-scale human rights abuses, coup d'état and terrorist acts.<sup>18</sup>

The conflict in the former Yugoslavia in the early 1990's constituted one of the first shots to broaden the type of actions as well as the type of situations requiring a measure under Chapter VII.<sup>19</sup> In his report on the establishment of the ICTY, the SG wrote that a decision to establish a tribunal under Chapter VII 'would constitute a measure to maintain or restore international peace or security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression'.<sup>20</sup> Accordingly, the SC determined the situation of widespread and flagrant violations of international humanitarian law within the territory of the former Yugoslavia continued to constitute a threat to international peace and security.<sup>21</sup> It then affirmed to be convinced that 'the establishment as an *ad hoc* measure by the Council of an international tribunal [...] would contribute to the restoration and maintenance of peace.'<sup>22</sup> The same type of determination and purpose appeared in the

<sup>16</sup> See *ibid* 1294, S Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 181; A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 60; PC Szasz, 'The Security Council Starts Legislating' (2002) 96 AJIL 904 ; FL Kirgis, 'The Security Council's First Fifty Years' (1995) 89 AJIL 512; contra P D'Argent and others, 'Article 39' in JP Cot, A Pellet, M Forteau (eds), *La Charte des Nations Unies: commentaire article par article* (Economica 2005) 1134; B Conforti, *The Law and Practice of the United Nations* (Martinus Nijhoff 2005) 151.

<sup>17</sup> See S Lamb, 'Legal Limits to United Nations Security Council Powers' in GS Goodwin-Gill, S Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (OUP 1999) 375.

<sup>18</sup> B Elberling, 'The Ultra Vires Character of Legislative Action by the Security Council' (2005) 2 Intl Organizations L Rev 337.

<sup>19</sup> See E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004) 150-153.

<sup>20</sup> UN Doc S/25704 (n 7) 1168.

<sup>21</sup> UNSC Res 808 (22 February 1993) UN Doc S/RES/808 had already affirmed that the situation in the former Yugoslavia constituted a threat to international peace and security.

<sup>22</sup> UNSC Res 827 (n 6) para 7.



resolution creating the ICTR.<sup>23</sup> As Matthew Happold notes there had to be the existence of a specific situation mentioned in Article 39, and the action taken under Chapter VII had to aim at the maintenance or restoration of international peace and security.<sup>24</sup>

In Resolution 1966 (2010), the SC recalls that ‘the Tribunals were established in the particular circumstances of the former Yugoslavia and Rwanda as *ad hoc* measures contributing to the restoration and maintenance of peace’.<sup>25</sup> However, while the SC is ‘[a]cting under Chapter VII’ it does not determine that the current situations in the former Yugoslavia and Rwanda constitute a threat to international peace and security any longer. The SC had certainly affirmed in previous resolutions that it ‘remained convinced’ that the prosecution of persons responsible for crimes within the *ad hoc* tribunals’ jurisdiction contributed to the restoration and maintenance of peace in the former Yugoslavia and Rwanda.<sup>26</sup> Yet, at the time of setting the Residual Mechanism the SC simply ‘reaffirm[s] its determination to combat impunity [...] and the necessity that all persons indicted by the ICTY and ICTR are brought to justice.’<sup>27</sup> This affirmation stands as the aim of the measure as well as the SC ground for acting under Chapter VII. There is thus a resort to Chapter VII without having declared that there is a contemporary threat to the peace and that the SC’s measure aims to restore or maintain peace and security.

Admittedly, the SC has the discretion to determine that impunity of those charged with genocide, crimes against humanity and war crimes by the *ad hoc* tribunals constitutes a threat to the peace.<sup>28</sup> This is however missing from Resolution 1966 (2010). This omission may be attributed to the SC’s concern that making such determination would clash with the ending of the ICTY’s temporal jurisdiction. As pointed out in the previous section, the ICTY’s temporal jurisdiction was linked to the end of a

<sup>23</sup> UNSC Res 955 (8 November 1994) UN Doc S/RES/955, paras 4-8.

<sup>24</sup> M Happold, ‘Security Council Resolution 1373 and the Constitution of the United Nations’ (2003) 16 *Leiden J Intl L* 602.

<sup>25</sup> UNSC Res 1966 (n 14) preamb para 5.

<sup>26</sup> UNSC Res 1329 (n 9) preamb paras 3, 4; See also UNSC Res 1503 (n 10).

<sup>27</sup> UNSC Res 1966 (n 14) para 6.

<sup>28</sup> The SC has wide discretion on making such determination, see C Sampford, ‘Parsing Security Council Resolutions: A Five-dimensional Taxonomy of Normative Properties’ in V Popovski, T Fraser (eds), *The Security Council as a Global Legislator* (Routledge 2014) 61.



‘threat to the peace’ in the region.<sup>29</sup> Hence, it could be argued that the creation of the Residual Mechanism on the premise that the situation in the former Yugoslavia and Rwanda continued to constitute a threat to the peace would revitalize the ICTY’s temporal jurisdiction. But this interpretation would misconstrue the SC’s intention. According to Sarooshi, ‘there would need to be a clear expression of intention by the Council that the Tribunal is to be terminated’.<sup>30</sup> The resolution setting out the completion strategies were doing such work. Thus, the SC could have declared that impunity for those who had been charged by the *ad hoc* tribunals continued to constitute a threat to the peace, and thus establish the Mechanism without reviving the ICTY jurisdiction.

A more plausible explanation for the SC’s reserve is its awareness that no such threat still existed and thus that the situations in Rwanda and the former Yugoslavia did not constitute valid Article 39 cases.<sup>31</sup> Indeed, one may argue that there are other instances where the SC omitted to make an Article 39 determination while deciding on an enforcement action.<sup>32</sup> For instance, SC Resolution 1160 (1998) of 31 March 1998, imposing an arm embargo against the Federal Republic of Yugoslavia, including Kosovo, abstained from determining that the specific situation constituted a threat to the peace. The official record of the meeting however shows that seven States clearly expressed that the situation in Kosovo constituted a threat to international peace and security, while Russia declared that despite voting in favour of the resolution it did not consider the Kosovo situation as constituting such a threat.<sup>33</sup> Conversely, the United Kingdom representative stressed that by acting under Chapter VII, it is implied that the SC considers that the situation in Kosovo constitute a threat to international peace and security.<sup>34</sup>

A further case in point is SC Resolution 1970 (2011) of 26 February 2011, referring the situation in Libya to the International Criminal Court

<sup>29</sup> See section 1.

<sup>30</sup> See D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (OUP 2000) 132-133.

<sup>31</sup> See *Prosecutor v Karadic* (Decision on Accused’s Motion to Dismiss the Indictment) IT-95-5/18-T, T Ch (28 August 2013).

<sup>32</sup> See Krisch (n 15) 1295.

<sup>33</sup> See UNSC Verbatim Record (31 March 1998) UN Doc S/PV.3868.

<sup>34</sup> *ibid* 12.

and enacting an arm embargo. While the SC did not characterize the Libyan situation as a threat to the peace,<sup>35</sup> several preambular paragraphs implicitly entailed that the oppression enacted by Gaddafi's regime was about to fall in this trap.<sup>36</sup> SC Resolution 1970 (2011) was adopted at the time where the Gaddafi's repression had not yet swirled into an armed conflict. This may explain why the SC avoided making a formal 'threat to the peace' determination.<sup>37</sup> Nico Krisch maintains that ominous silences on whether Article 39 trigger events existed at the time of taking a Chapter VII enforcement measures 'reflect an agreement of SC members on a particular action while bracketing questions of its legal foundations or broader implications'.<sup>38</sup>

The context in which the resolution creating the Residual Mechanism was adopted displays an agreement to act under Chapter VII despite the inexistence of a contemporary threat to the peace. No SC Member State expressed disapproval with the establishment of the Residual Mechanism. Russia abstention did not relate to the establishment of the Mechanism but rather to the maintenance of the *ad hoc* tribunals in the transitional period while the Mechanism was being made fully operative. Indeed, no debate on the existence of a threat to the peace occurred during the SC meeting of 22 December 2010; the word 'peace' is not mentioned even once in the official record. Conversely, it was firmly believed that '[t]he establishment of the residual mechanism sends a strong Security Council message against impunity'.<sup>39</sup>

<sup>35</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; Krisch (n 15) 1295.

<sup>36</sup> See UNSC Res 1970 (n 35) preamb paras 2, 3, 7, 8, 9, 10, 12 and 16.

<sup>37</sup> Krisch (n 15) 1295. Two other factors may also explain the lack of concern regarding the legal basis to act under Chapter VII. SC Resolution 1970 was adopted with the support of the Arab League, the African Union and the Organization of the Islamic Conference. It also relied on the support from the Permanent Representative of the Libyan delegation (who had broke off from Gaddafi regime on the same day), who called for 'a swift, decisive and courageous resolution'. Indeed, Nico Krisch observes that the SC, when operating in unsettled terrain, such as the omission to first determine a 'threat to the peace', seeks consent, and support from regional organizations to dispel concerns over the legal basis to act. Krisch notes a third reason, greater participation in the SC meeting but it does not apply to SC 1970. Krisch (n 15) 1291-1293.

<sup>38</sup> *ibid* 1295.

<sup>39</sup> UNSC Verbatim Record (22 December 2010) UN Doc S/PV.6463, 4, Statement of the Austrian Representative, who also chaired the Informal Working Group on International Tribunals, which work was essential to the drafting of the Mechanism' structure and functions.



Georg Nolte argues that an enforcement measure dispensing with a formal determination under Article 39 would be ultra vires if a majority of States members to the SC approved the measure while acknowledging that no threat to peace existed.<sup>40</sup> While a substantial debate reigns over the SC's discretion in determining which situation constitutes one of the trigger events under Article 39 UN Charter, the establishment of the Residual Mechanism under Chapter VII brings a new shade to the SC's practice. Indeed, if we consider Resolution 1966 (2010) as intra vires, it does point out that the fight against impunity on its own can trigger the SC's power under Article 41.

4. *Did the establishment of the Residual Mechanism require the use of Chapter VII?*

The Residual Mechanism is a new subsidiary organ of the Security Council.<sup>41</sup> While the Residual Mechanism continues the jurisdiction, as well as the rights and obligations, of both *ad hoc* tribunals,<sup>42</sup> it constitutes a different entity than its ancestors. A period of coexistence has been foreseen where the *ad hoc* tribunals are mandated to complete their work, while the Mechanism is being put into place.<sup>43</sup>

The Residual Mechanism Statute sets out the detail of its structure and functions. It resembles as well as differs in certain aspects of the *ad hoc* tribunals instruments. It resembles them in that, the trial of fugitive indictees, review of judgments, the supervision of enforcement sentences and protection of witnesses are functions the Mechanism inherited from

<sup>40</sup> G Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections' in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2001) 316.

<sup>41</sup> B Landale, H LLewelyn 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' (2011) 8 Intl Organizations L Rev 352-353.

<sup>42</sup> T W Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation' (2011) 9 J Intl Criminal Justice 809.

<sup>43</sup> The Second Annex to SC Resolution 1966 (2010) contains a specific transitional arrangement to coordinate the interim period where the three bodies are coexisting.

the *ad hoc* tribunals Statute.<sup>44</sup> The Mechanism's empowerment to deal with the supervision of enforcement sentences and the protection of victims did not necessarily require the use of the SC's Chapter VII. While they also imply a horizontal relationship with State's jurisdiction, in that the Mechanism remains with the final say, they rely by large on agreements with States and international organizations.

On the other hand, the Mechanism's competence over fugitive indictees does not rely on State's consent. Like for the *ad hoc* tribunals, States are obliged to cooperate fully with the Mechanism in the investigation and prosecution of crimes within its Statute.<sup>45</sup> If a national authority apprehends an indicted fugitive it is under the obligation to extradite the accused to the Mechanism. The same obligation to extradite applies if the Prosecutor application for review of an acquittal judgment is granted. These proceedings also imply that the Residual Mechanism may have to issue orders for inter alia the taking of testimony, the production of evidence, the service of documents.<sup>46</sup>

It could have been argued that as the Mechanism is continuing the 'material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR', as well as their 'rights and obligations', the obligation to cooperate flowing from Resolutions 827 (1993) and 955 (1994) applied *mutatis mutandis* to the Mechanism. However, this was not the avenue the SC decided to take. Instead, the obligation to cooperate is provided in Article 28 of the Residual Mechanism Statute and operative paragraph 9 of Resolution 1966 (2010), which also specifies that 'consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute of the Mechanism'. Thus, to fulfil Resolution 1966 (2010), all States have to enact laws to ensure compliance and cooperation with the Mechanism's decisions. This is indeed the type of measure that only a Chapter VII resolution could enable, as it directly penetrate the domestic realm. Further-

<sup>44</sup> Pittman (n 42) 815.

<sup>45</sup> UNSC Res 1966 (n 14) para 9; cf UNSC Res 827 (6) para 4; UNSC Res 955 (n 23) para 2.

<sup>46</sup> See art 29 ICTY Statute, art 28 ICTR Statute and art 28 Mechanism Statute; see also *Prosecutor v Blaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108*bis*, A Ch (29 October 1997) (hereinafter *Blaskic subpoena*).



more, by resolution 1966 (2010), the SC expressly provides for ‘the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute’.<sup>47</sup> This thus confirms that the Mechanism is a subsidiary organ to which the SC delegated its power of binding decision under Article 25 UN Charter.<sup>48</sup>

Of the eight so-called ‘residual functions’ four were not explicitly listed in the *ad hoc* tribunals’ Statute. They are either novel or integrating rules within the Residual Mechanism Statute that were provided in the *ad hoc* tribunals’ Rules of Procedure and Evidence (RPE). First, the power to initiate contempt proceedings was not provided for in the Statutes of the *ad hoc* tribunals. Instead it was inserted by decision of the judges of each tribunal when adopting their respective RPEs.<sup>49</sup> The power to issue arrest warrant for contempt was indeed one of the clearest evidence of judicial lawmaking from the *ad hoc* tribunals and were contested on that basis.<sup>50</sup> For instance, a pending ICTY contempt of court case remains to be executed, as Serbia refuses to extradite the three accused arguing that the duty to cooperate does not apply in matters of contempt.<sup>51</sup> The SC, upon the recommendation of the SG, decided to directly legislate on this matter.<sup>52</sup> As the crimes of contempt and false

<sup>47</sup> See eg *Prosecutor v Ngirabatware* (Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Aka) MICT-12-29-R, A Ch (31 January 2017) para 16.

<sup>48</sup> *Blaskic subpoena* (n 46) para 26.

<sup>49</sup> The wording of art 1(4) of the Statute, which provides for this competence, reflects ICTY and ICTR Rules of Procedure and Evidence, Rules 77 and 91 respectively; see C Denis, ‘Critical Overview of the “Residual Mechanism” of the Mechanism and its Date of Commencement (including Transitional Arrangements)’ (2011) 9 J Intl Criminal Justice 826.

<sup>50</sup> Note also that the ICTY Appeals Chamber found that it had an inherent power to deal with contempt cases, see *Prosecutor v Tadic* (Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin) IT-94-1-A-R77, A Ch (31 January 2000) para 13-28; see also M Bohlander, ‘International Criminal Tribunals and Their Power to Punish Contempt and False Testimony’ (2001) 12 Criminal L Forum 91-118.

<sup>51</sup> *Prosecutor v Jojic et al* (Decision advising the Tribunal’s President of the Republic of Serbia’s Continued Failure to cooperate with the Tribunal) IT-03-67-R77.S, T Ch I (14 September 2016); See K Kappos, P Hayden, ‘Current Developments at the Ad Hoc Tribunals’ (2016) 14 J Intl Criminal Justice 1295. See UNSC Verbatim Record (8 December 2016) UN Doc S/PV.7829, 27.

<sup>52</sup> ‘Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals’ (21 May 2009) UN Doc S/2009/258.

testimony are now explicitly enshrined in the Residual Mechanism Statute, the controversy as to whether States are obliged to arrest and surrender individuals accused of contempt is thus resolved.<sup>53</sup> By the same token, States are explicitly obliged to ensure that their domestic law cover a request for extradition coming from the Mechanism, including if the request is with respect to contempt cases.<sup>54</sup>

Second, the Residual Mechanism Statute now expressly provides for the referral of cases to national jurisdictions.<sup>55</sup> The *ad hoc* tribunals jurisdiction, as well as the Mechanism's to a certain extent, have 'primacy jurisdiction', meaning that they can request national authorities to defer to their jurisdiction.<sup>56</sup> The Mechanism does not have the power to issue new indictment against persons who are suspected of having committed crimes falling within the jurisdiction of the *ad hoc* tribunals.<sup>57</sup> However, the Statute provides that the Mechanism has competence over all of the fugitive indicted by the *ad hoc* tribunals. That being said, senior level and low level indictees are treated differently. With respect to the latter category, the Mechanism may only proceed to trial after all reasonable efforts to refer the case to national authorities have been exhausted.<sup>58</sup> Therefore, the power previously contained in Rule 11*bis* of the RPEs for the *ad hoc* tribunals are now turned into a requirement for the Mechanism.<sup>59</sup>

Resolution 1966 (2010) falls short of 'deciding', and instead 'calls upon all States to cooperate to the maximum extent possible in order to receive referred cases'.<sup>60</sup> A legal obligation would have meant that States must enact universal jurisdiction legislation for international crimes committed in the former Yugoslavia and Rwanda. Although States remain

<sup>53</sup> See A Zahar, 'International Court and Private Citizen' (2009) 12 *New Criminal L Rev* 578-579; B Gideon et al (eds) *International Criminal Procedure* (CUP 2011) 64, fn 95.

<sup>54</sup> Obviously, States may decide to extend their jurisdictional links to welcome cases referred by the Mechanism.

<sup>55</sup> Residual Mechanism Statute, art 1(3).

<sup>56</sup> Residual Mechanism Statute, art 5(2); ICTY Statute art 9(2); ICTR Statute, art 10(2).

<sup>57</sup> Residual Mechanism Statute, art 1(5).

<sup>58</sup> Residual Mechanism Statute, art 1(3), 6(1). The power to refer cases to national authorities is also provided with respect to contempt cases, Residual Mechanism Statute, Article 1 (4); The requirement is of a lower threshold in such cases as the Mechanism does not need to exhaust all reasonable efforts to refer contempt cases.

<sup>59</sup> Landale and LLewelyn (n 41) 356.

<sup>60</sup> UNSC Res 1966 (n 14) para 12.



free not to accept referrals of cases, once a State receives a referral it subjects itself to outside judicial scrutiny. Article 6 (5), which regulates the referral of cases, provides that the Mechanism must monitor cases referred to national courts, while this was discretionary under Rule 11*bis*. If domestic proceedings do not respect the conditions for the referral of the case and the Chamber deems it in the interests of justice, it may request a deferral of the case.<sup>61</sup> Once again, this is the type of measure invading an area, that is, how a national court conducts its proceedings, which is essentially within the domestic jurisdiction of States. Also, the power to order the State to defer the case back to the Mechanism is indeed predicated on the latter power to issue binding orders.

Third, the Residual Mechanism has to respond to requests for assistance from national authorities in relation to investigation, prosecution and trial of those responsible of international crimes in the countries of former Yugoslavia and Rwanda, including where appropriate, providing assistance in tracking fugitives whose cases have been referred to national authorities by the ICTY, the ICTR or the Mechanism.<sup>62</sup> This function does include an obligation – respond to requests for assistance – but one that is incumbent on the Mechanism rather than on States.<sup>63</sup> In other words, this function is not predicated on the Chapter VII power underlying the Residual Mechanism Statute but may last for many years to come.

Fourth, Resolution 1966 (2010) provides that the Residual Mechanism is responsible for the management, including preservation and access of its, as well as the ICTY's and ICTR's, archives.<sup>64</sup> The management of the archives was not explicitly foreseen by the *ad hoc* tribunals' Statute,<sup>65</sup> but it may indeed be, after the prosecution of fugitive senior level indictees, the most important function of the Mechanism.<sup>66</sup> It is also a function that is inherently permanent. According to the SG, archives are defined as 'records to be permanently preserved for their administrative,

<sup>61</sup> Residual Mechanism Statute, art 6(6).

<sup>62</sup> Residual Mechanism Statute, art 28(3).

<sup>63</sup> *ibid.*

<sup>64</sup> Residual Mechanism Statute, art 27(2).

<sup>65</sup> Pittman (n 42) 816.

<sup>66</sup> Denis (n 49) 833.

fiscal, legal historical or information value'.<sup>67</sup> Unless this task is later attributed to the UN Secretariat in New York, like for the report of the United Nations Iraq-Kuwait Demarcation Commission, the Mechanism will have to remain in existence indefinitely. While this function is opposite to the alleged *ad hoc* nature of the Residual Mechanism, it does not seem to require the Chapter VII powers of the SC to remain in place. Indeed, it does not entail any sort of enforcement power to be implemented, unless the archives are hosted in a State not willing to accept them.

A resolution under Chapter VI could have possibly been sufficient to provide the Mechanism with most of its residual functions.<sup>68</sup> Only the functions surrounding the effective and fair conduct of a criminal trial required that an obligation be imposed on all States to cooperate and provide judicial assistance to the Mechanism. While the functions of the Mechanism are said to be 'residual', some of them are innovative. However, not all the novel functions of the Mechanism are predicated on the Chapter VII nature of the Mechanism's Statute. The functions that are relying on the Mechanism's power to issue binding decisions or intrude the 'domaine réservé' are not of a long-term nature. Conversely, the inherently continuous functions are not resting on the binding nature of the Residual Mechanism Statute.

## 5. Conclusion

Resolution 1966 (2010), to which the Residual Mechanism Statute is annexed, was adopted by the SC acting under Chapter VII to carry out residual functions of the *ad hoc* tribunals. Although it constitutes a further step in affirming that the fight against impunity is one of SC's priorities,

<sup>67</sup> Secretary-General's bulletin 'Record-keeping and the management of United Nations archives' (12 February 2007) UN Doc ST/SGB/2007/5 Section 1(a).

<sup>68</sup> See for eg the proposal of the 'Report Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135' (16 March 1999) UN Doc A/53/850, para 42; *Prosecutor v Fofana* (Decision on preliminary Motion on Lack of Jurisdiction *Materiae: Illegal Delegation of Powers by the United Nations*) SCSL-2004-14-AR72(E), A Ch (25 May 2004) para 19; S Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 259.



the establishment of the Residual Mechanism also marks a further deviation from the UN Charter.

If a new *Tadic* case was to take place, the Chamber would probably find that, as for the *ad hoc* tribunals, the establishment of the Residual Mechanism ‘falls squarely within the powers of the Security Council under Article 41’ UN Charter.<sup>69</sup> However, it could also probably conclude that the SC had to make ‘the determination that there exists one of the situations justifying the use of the ‘exceptional powers’ of Chapter VII.’<sup>70</sup> It is this specific requirement that makes Resolution 1966 (2010) suspicious.

More than fifteen years after the establishment of the *ad hoc* tribunals, the situations in the former Yugoslavia and Rwanda have apparently ceased to be considered threats to international peace and security. This however did not prevent the SC from acting under Chapter VII. In this sense, despite the repeated claim that they are very expensive, that they took a long time to carry out their work, and that they were subject to political pressure, the establishment of the Residual Mechanism is evidence that the SC assumes its ‘parental responsibility’ with regard to the work of its progenies. Or, at the very least that it would have lacked integrity to close down the Tribunals without seeking a certain form of consistency with regards to accountability for the crimes committed in the former Yugoslavia and Rwanda.<sup>71</sup>

The gist of the SC’s omission to find a threat to the peace while acting under Chapter VII to establish the Residual Mechanism resides in the contradiction between the creation of temporary tribunals and the continuous obligations stemming from their work. In Resolution 1966 (2010), the SC emphasized that the Tribunals had been conceived as *ad hoc* measures, and that the Residual Mechanism itself was also *ad hoc*. The resolution also stresses out that the Mechanism shall be a ‘small, temporary and efficient structure’.<sup>72</sup> It further provides that the Mechanism

<sup>69</sup> *Prosecutor v Tadic* (Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-I-AR72, A Ch (2 October 1995) para 36.

<sup>70</sup> *ibid* para 29.

<sup>71</sup> However, see M Arcari, ‘A Vetoed International Criminal Justice? Cursory Remarks on the Current Relationship Between the UN Security Council and International Criminal Courts and Tribunals’ (2016) 10 *Diritti Umani e Diritto Internazionale* 363 with regards to other situations.

<sup>72</sup> UNSC Res 1966 (n 14) preambular para 5, 6, 7.

is set for an initial period of four years and will be reviewed before the end of this period and every two years thereafter. It was indeed a debate whether some of the Mechanism functions necessarily entailed that it remain in place for many more decades. As Landale and Llewellyn noted, some of the residual functions ‘are continuous in nature, not *ad hoc*, e.g., witness protection, monitoring of sentence enforcement, and management of the archives.’<sup>73</sup> Tortora rightly adds that the assistance to national jurisdiction is also part of this ‘long-term responsibility’ category.<sup>74</sup> The functions that are by nature continuous – albeit novel – do not necessarily require the use of Chapter VII powers. That being said, the Residual Mechanism’s need of a Chapter VII underpinning will continue until all indictees have been tried and convicted or acquitted. Afterwards, the *ad hoc* nature of the Residual Mechanism will resurface. It is thus to be considered whether the next step will be for the SC to provide for these continuous residual functions under Chapter VI of the UN Charter.

<sup>73</sup> Landale, Llewellyn (n 41) 354.

<sup>74</sup> G Tortora, ‘The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges’ 21 *ASIL Insight* (2017).

